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No. 96-1671

In the Supreme Court of the United States

OCTOBER TERM, 1996

FRANKLIN D. RAINES, ET AL.,

Appellants,

v.

ROBERT C. BYRD, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MEMORANDUM IN RESPONSE TO JURISDICTIONAL STATEMENT

TO BE PRINTED

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QUESTIONS PRESENTED

Appellees agree with the statement of the Questions Presented made by appellants.

PARTIES TO THE PROCEEDINGS

Appellees agree with the statement of the Parties to the Proceedings made by appellants.

ARGUMENT

Appellees agree that the Court should note probable jurisdiction in this case. Because the case presents issues of substantial public importance, appellees have also joined with the Solicitor General in moving the Court to set an expedited schedule for briefing and argument.

To facilitate such expedition, appellees agreed with the Solicitor General to file their response today, one business day after the Jurisdictional Statement was filed. Under the circumstances, appellees will not here answer the extensive arguments set forth in the Jurisdictional Statement in support of appellants' contentions on appeal. Appellees do, however, wish to make four points at this stage about the nature of the issues presented.

1. The Act itself authorizes "[a]ny Member of Congress" to challenge the constitutionality of the Act and commands expedited consideration of any such challenge. 2 U.S.C. § 692(a)(1), (c). It does so because proponents of the Act recognized that it would be born under a constitutional cloud, which they wanted resolved as promptly as possible.[1/] This statutory provision removes all prudential barriers to standing. E.g., Bennett v. Spear, --- U.S. ---, 117 S.Ct. 1154, 1161-62 (1997); Synar v. United States, 626 F. Supp. 1374, 1380 n.3 (D.D.C.)(three-judge court), aff'd, 478 U.S. 714 (1986). The issue, with respect to Member standing, is whether the statutory provision authorizing Members to seek prompt judicial review is constitutional.

1/ E.g., 141 Cong. Rec. S4244 (daily ed. Mar. 21, 1995) (Statement of Senator Exon) ("We do not want that cloud hanging over forever. The [judicial review provision] simply allows a speedy resolution of this constitutional issue. It does not allow a legal challenge to hang over all the [appropriations] bills for years upon years."); 141 Cong. Rec. H1138 (daily ed. Feb. 2, 1995) (statement of Rep. Deal); see also Colloquy of Sen Simon and Sen. McCain, 141 Cong. Rec. S4244-45 (daily ed. Mar. 21, 1995).

2. Although this Court has not resolved the question of the standing of Members of Congress presented in this case, the D.C. Circuit has considered the question extensively and has concluded in a number of cases that a Member of Congress does, like a private plaintiff, have standing if he or she alleges a distinct and palpable injury, traceable to the act complained of, and remediable by the court. E.g., Boehner v. Anderson, 30 F.3d 156, 159-60 (1994); Michel v. Anderson, 14 F.3d 623, 625-26 (1994); Moore v. House of Representatives, 733 F.2d 946, 950-53 (D.C. Cir. 1984), cert. denied, 469 U.S. 1106 (1985); Vander Jagt v. O'Neill, 699 F.2d 1166, 1168-71 (D.C. Cir. 1992), cert. denied, 464 U.S. 823 (1983). These decisions are of course not binding on this Court, but they reflect the considered wisdom of a large number of distinguished appellate judges.

In particular, in Moore, supra, Judge Wilkey drew the following critical distinction:

> It is important . . . that the injury claimed here is to the members' rights to participate and vote on legislation in a manner defined by the Constitution. Deprivation of a constitutionally mandated process of enacting law may inflict a more specific injury on a member of Congress than would be presented by a generalized complaint that a legislator's effectiveness is diminished by allegedly illegal activities taking place outside the legislative forum.

733 F.2d at 951. Here, the appellee Members have alleged and asserted by declaration exactly this kind of specific injury to their individual constitutional prerogatives as Members.

As they deliberate and vote on both appropriations bills and other matters, individual Members are directly affected by the markedly enhanced power that the Act gives the President. Proponents as well as opponents recognized that the Act would significantly alter Members' behavior in the conduct of legislative business regarless of whether the item veto was ever exercised. See 141 Cong. Rec. S4076, S4140, S4142, S4221, S4240 (daily ed. Mar. 16, 17, 21,

1995). As appellees' declarations attest, the threat that the President may veto an item desired by an individual Member "hangs over" the Member as he votes "like the sword of Damocles," creating "a 'here-and-now' subservience" to the President "sufficient to raise constitutional questions." Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 264-65 and n.13 (1991) (describing effect of congressional agent's power to veto decisions of airport board of directors). In addition, it prevents Members from reaching compromises on appropriations and other matters, because such compromises can later be undone by item vetoes.[2/]

Moreover, as the district court found, Pet. App. at 11a-12a, whenever an individual Member votes on an appropriation bill, the Act injures the Member by unconstitutionally altering the legal effect of his or her vote. The Act converts each vote on an appropriation bill into a vote on that bill and a whole series of variations, depriving the Member of his or her constitutional right to vote on each bill in its exact final form. Under the Act, a Member considering his or her vote on the "ABC" appropriation bill cannot vote for that bill without by the same action voting to present the President with what he can item-veto into an "AB" bill, a "BC" bill, and every other combination that can be constructed out of items "A", "B", and "C." But a Member who favors "ABC" may not favor "BC" without A (or may simply not have had a chance to study all the possible combinations). Since options have value, the Act, by converting each vote for an appropriations bill into a vote for a "menu" of combinations among which the President may

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[2/] See Declaration of Robert C. Byrd ¶¶ 18, 20-21; Declaration of Mark O. Hatfield ¶ 4; Declaration of Carl Levin ¶¶ 4, 6, 6A; Declaration of David Skaggs ¶¶ 3, 6; Declaration of Henry A. Waxman ¶ 7.

choose, inflicts a concrete injury, each time a vote is taken, on each Member in the exercise of his or her most central power, the power to vote on the passage of legislation.

Appellants note (J.S. 14) that there has not yet been a vote on final passage of an appropriations bill. But it is clearly constitutionally sufficient that an alleged injury be "certainly impending," e.g., Whitmore v. Arkansas, 495 U.S. 149, 158 (1990), and there is no doubt that the plaintiff Members will be called on to vote on appropriations bills in the coming weeks. See Byrd Decl. ¶ 6.

Finally, a Member will be additionally injured when the President item vetoes an item desired by that Member or critical to his or her vote. While appellees are of course correct that this has not yet occurred, the President has expressed an interest in using his veto power promptly, and there is no reason to doubt that he will.[3/]

These are important claims of injury, which cannot be dismissed as mere generic interests, shared with the public at large, in "the operation or outcome of the legislative process" (J.S. 18). Appellees will say more about these matters in their briefs.

3. The stated purpose of the Act is to give the President the line item veto power, and that is precisely what the Act does. It gives the President the power to determine, in conjunction with signing a bill, that some of its provisions will become operative as law and others will not.

The Act is entitled the "Line Item Veto Act of 1996." Its legislative history confirms that Congress intended to empower the President to veto items of discretionary spending, new direct

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[3/] See, e.g., 141 Cong. Rec. S8202-03 (daily ed. June 13, 1995) (containing letter from President to Speaker of the House; "Dear Mr. Speaker: I am writing to urge that Congress quickly complete work on the line-item veto legislation so I can use it -- this year -- to curb wasteful tax and spending provisions"); Statement by the President, Upon Signing S.4 (Apr. 9, 1996).

spending, or limited tax benefits that he disapproves.[4] The Act does precisely that: it authorizes the President to sign a bill and then immediately to strike provisions he disapproves, literally before the ink of his signature is dry. (The Act allows the President to take up to five days for reasons of administrative convenience, but the stated intention was that signing and cancellation take place as promptly as possible, without any intervening event.[5]) The issue on the merits in this case is whether the statutory mechanism Congress invented to give the President the long-sought line item veto power is constitutional.

Article I has long, and almost universally, been read to bar giving the President the line item veto power. President Washington recognized that the Presentment Clause, U.S. Const. Art. I, sec. 7, cl. 2, permits the President only to approve and sign a bill "in toto," or return it in toto, or do nothing, and does not allow him to approve and sign some parts and reject and return others. 33 Writings of George Washington 96 (1940). Later Presidents and their advisors have agreed.[6] The Act sought to evade the "in toto" requirement by providing that the President, after first signing an entire bill, may then strike ("cancel") the provisions he does not like an instant (or

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[4] For example, bills that led to the Act, as reported out in both Houses of Congress, used the words "veto" and "repeal." H.R. 2, 104th Cong. 1st Sess. (1995); S. 4, 104th Cong. 1st Sess. (1995). The Act as adopted uses the word "cancel," but the effect remained the same. See H.R. Conf. Rep. No. 104-491, at 20, 22 (1996).

[5] H.R. Conf. Rep. No. 104-491, at 22 (1996).

[6] See, e.g., 6 James D. Richardson, Messages and Papers of the Presidents 472 (1898) (President Johnson unable to sign only part of a bill into law); 7 id. at 242 (President Grant urging adoption of constitutional amendment in order to achieve the otherwise unachievable item veto); id. at 531-47 (President Hayes, same); William Howard Taft, The Presidency: Its Duties, Its Powers, Its Opportunities and Its Limitations 11 (1916) (President "has no power to veto parts of the bill and allow the rest to become a law); 22 Weekly Comp. Pres. Doc 1567 (Nov. 14, 1986) (President Reagan unable to sign only part of a bill into law) .

up to five days) later. The question on the merits in this case is whether this statutory mechanism is constitutional.

The answer is no. The Presentment Clause is not "empty formality." Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 958, n.22 (1983). Its purpose is to assure that every enactment, amendment, or repeal of federal statutory law has been passed by both Houses of Congress in its exact final form and then either "approve[d]" and signed in toto by the President or adopted in toto without his signature or over his veto in the manner the Clause prescribes. The Act violates that requirement. It authorizes the President to sign a bill even if he will strike 5% or 95% of its provisions an instant later, so that the President's signature no longer signifies his approval of the whole Act as one he will faithfully execute. And in authorizing the President to "cancel" the provisions he does not like, the Act gives him an unconstitutional unilateral power of repeal:[7] "cancel" is defined to mean "rescind" or "prevent . . . from having legal force or effect," and every cancellation is permanent and irrevocable.[8]

4. Appellants argued below and reassert in this Court that the Act merely gives the President "discretion" not to spend appropriated amounts. But the Act is nothing like a typical delegation of executive authority. It gives the President a one-time, irreversible, and virtually unconstrained opportunity at signing to strike any spending provision he thinks is not "essential,"

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[7] As Chadha made clear, "Amendment and repeal of statutes, no less than enactment, must conform with Art. I." 462 U.S. at 954.

[8] Appellants note that the Act provides for "disapproval bills" by which the Congress may override an item veto. That provision does not affect the constitutional question presented. A "disapproval bill" is a new law, which must be enacted with the President's signature or over his veto in the traditional manner. The Act merely provides for expediting its consideration. The significance of the disapproval bill provision for present purposes is that it demonstrates that a "canceled" provision is entirely dead.

2 U.S.C. § 691(a)(A)(ii). The Act's purpose is to give the President the line item veto power -- a step, as the District Court put it, that "give[s] away the power to shape the content of a statute of the United States," Pet. App. at 25a.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted,

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